

DEPARTMENT OF STATE REVENUE

02900358.SLF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER 90-0358 ITC
GROSS ADJUSTED GROSS INCOME TAX
For Years 1981, 1982, 1983 AND 1984

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ISSUES

1. Adjusted Gross Income Tax – Addback of Taxes

Authority: IC 6-3-1-3.5.

The taxpayer protested the addback of West Virginia and Washington Business and Occupation taxes and the addback of Michigan Single Business Tax.

2. Adjusted Gross Income Tax - Dividend Received Deduction

Authority:

The taxpayer protested the disallowance of the 100% Dividend Received Deduction.

3. Adjusted Gross Income Tax – Miscalculation of Net Operating Loss

Authority:

The taxpayer protested the calculation of the net operating loss carryforward

4. Gross Income Tax - Agency

Authority: IC 45 IAC 1-1-54(2); 45 IAC 1-1-45; *Bloomington Country Club v. State of Indiana, Dept. of Revenue*, (2nd. Tax 1989); *United Artists Theater Circuit v. Indiana Dept of State Revenue*, (2nd. App. 1st Dist. 1984), 459 N.E.2d 754.

The taxpayer protested the assessment of gross income tax on receipts from a wholly owned subsidiary.

5. Gross and Adjusted Gross Income Tax – Claims for refund.

Authority:

The taxpayer timely filed claims for refund – on the preceding four (4) issues.

STATEMENT OF FACTS

The taxpayer is a conglomerate engaged in several areas of business. The taxpayer has operations in most if not all of the fifty- (50) states of the United States and some foreign countries. The taxpayer requested a rehearing on letter of findings 90-0358, paid the tax in April of 1991 and filed amended returns "claims for refund" in March of 1993 based on the above referenced issues.

DISCUSSION

1. Adjusted Gross Income Tax – Addback of Taxes

In a letter dated November 8, 1995, the taxpayer conceded the issue of Michigan Single Business Tax.

Indiana Code 6-3-1-3.5(b) requires the addback of state taxes based on or measured by income. Indiana does not limit the addback of state taxes to only net income taxes. West Virginia and Washington Business and Occupation Taxes clearly provide that the basis of these taxes are the actual proceeds received from the sale of property without any reduction for the cost of the property or any other expenses. Gross proceeds of sales is defined by West Virginia as:

The value proceeding or accruing from the sale of tangible property without any deduction on account of cost of property sold, the cost of materials used labor costs, interest, discount paid, delivery cost, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses.

See CCH West Virginia Tax Reports Par. 68-805. See Also *Consolidated Coal Company v. Indiana Department of State Revenue*, 538 N.E.2d 309 (2nd. Tax 1989).

Gross proceeds of sales is defined by Washington as:

The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses.

See RCW 82.04.070

The West Virginia Business and Occupational Tax and the Washington Business and Occupational Tax are similar to the Indiana Gross Income Tax. The Department has consistently held that the taxes in question, like the Indiana gross income tax are measured by gross income or gross receipts, and therefore, must be added back in accordance with IC 6-3-1-3.5.

FINDINGS

The taxpayer's protest is denied and the taxpayer conceded the Michigan Single Business Tax.

2. Adjusted Gross Income Tax - Dividend Received Deduction

The taxpayer's protest was sustained in letter of findings number 90-0358. Therefore, the issue will not be addressed in this supplemental letter of findings.

FINDINGS

The taxpayer's protest is sustained.

3. Adjusted Gross Income Tax – Miscalculation of Net Operating Loss

The taxpayer protested the calculation of the net operating loss for years 1981 through 1984. The taxpayer would like the department to concede and allow the taxpayer to enhance the company's net operating loss at the taxpayer's discretion. The taxpayer has not provided the department with substantive issues or adequate documentation to prove that the auditor's calculation is deficient.

FINDINGS

Taxpayer's protest is denied.

4. Gross Income Tax - Agency

The taxpayer protested the assessment of gross income tax on receipts received from a wholly owned subsidiary. The taxpayer contends that Rule 45 IAC 1-1-54 provides that taxpayers are not subject to gross income tax on income they receive in an agency capacity. Where sufficient control over taxpayer's actions such that taxpayer acts pursuant to the other's wishes, an agency relationship is created. Industry standards mandate the performance of safety repairs on cars of other railroads under certain parameters adopted by the members of the industry. Taxpayer had no ability to choose whether or not to undertake such repairs. Thus, it is taxpayer's contention that the amounts received from these repairs are in the nature of cost reimbursements and do not result in receipts subject to Indiana Gross Income Tax.

The taxpayer also contends that the payments received from joint facilities were received in an agency capacity as reimbursements of expenses. The taxpayer stated that Rule 45 IAC 1-1-54 provides that where an agency relationship exists, reimbursements for costs under the agency relationship are not subject to Indiana gross income tax. Under such a relationship, a relinquishment of control by the agent to the principal is necessary such that the principal is responsible for the acts of the agent and/or the agent lacks sufficient control over his actions so as to be liable for such transactions.

Taxpayer received receipts representing the prorated cost of a shared joint facility. Taxpayer has entered into a contract whereby it has relinquished control over certain activities, such that an agency requirement has been created. In the situation at issue, taxpayer maintained certain facilities in working order, and in return, other using railroads were obligated to reimburse taxpayer on a pro-rata basis, for the expenses incurred by the railroad maintaining the facility. In this situation, the payments received by taxpayer do not represent gross receipts in the nature of income, but rather in the nature of reimbursements of expenses incurred by the taxpayer by and on behalf of the other railroads sharing the facility. When discussing the "agency" claim, it is important to keep in clear view the rule concerning the status of agency income. There is no rule that income received "as an agent" is not to be taxed; the "rule" is that "a taxpayer is not liable for gross income received on behalf of a third person" *United Artist Theater Circuit v. Indiana Department of State Revenue* (Ind. App. 1st Dist. 1984), 459 N.E.2d 754, 756-57. In this case, the receipts were not "received on behalf of a third person" but by the entities to whom they were due. There is not in this case a third person for whom the money was being collected by an entity, which had no legal right to the money. Compare *Bloomington Country Club v. State of Indiana, Department of Revenue* (Ind. Tax 1989), 543 N.E.2d 1. The receipts at issue are the taxpayer's receipts. The taxpayer is not merely passing the receipts along, as a conduit, to another person or entity. The fact is that the receipts at issue were receipts, for services rendered. In the instant situation there is no conduit merely the performance of services.

FINDINGS

The taxpayer's protest is denied.

5. Gross and Adjusted Gross Income Tax – Claims for refund.

The taxpayer has not paid any adjusted gross income for the years at issue. The original return was timely filed. Therefore, the statute of limitations for 1981, 1982, and 1983 expired in 1985, 1986 and 1987 respectively. The amended returns were not filed until March 13, 1993 well beyond the statute of limitations.

The taxpayer filed amended returns on March 13, 1993 for tax years 1981, 1982, and 1983. There are adjustments to both Gross and Adjusted gross income tax figures. Assessments of gross income tax were paid April 12, 1991. Therefore, the amended return is timely filed for Gross income tax purposes. The issues expressed are the assessment on the up front money in safe harbor leases and agency. The Department concedes the safe harbor lease issue and has addressed the agency issue above.

FINDINGS

Taxpayer's protest is partially sustained. The adjustments to adjusted gross income tax are denied as outside the statute of limitations. The taxpayer is sustained as to the issue of up front money paid in a safe harbor lease situation. The taxpayer is denied as to the agency issue. See Issue 4.